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Individually and on Behalf of All Similarly Situated Individuals

Additional Counsel Listed on Following Pages

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

RAMON GARCIA, an individual;
VICTOR RAMIREZ, an
individual; ADRIAN VALENTE,
an individual; MARIO PINON, an
individual; MYNOR CABRERA,
an individual; Individually, and on
Behalf of All Similarly Situated
Individuals

Plaintiffs,

vs.

MACY'S WEST STORES, INC.,
an Ohio corporation; JOSEPH
ELETTO TRANSFER, INC., a
New York corporation; XPO
LOGISTICS, LLC, an Ohio
corporation; and DOES 1 through
25, Inclusive,

Defendants.

Case No: 3:16-cv-04440-WHO
[The Honorable William H. Orrick]

CLASS ACTION

**NOTICE OF MOTION AND MOTION
FOR PRELIMINARY APPROVAL OF
PARTIAL CLASS ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: June 26, 2019
Time: 2:00 p.m.
Courtroom: 2 (17th Floor)

[CONCURRENTLY FILED WITH
DECLARATION OF MICHAEL H.
BOYAMIAN ISO MOTION FOR
PRELIMINARY APPROVAL; [PROPOSED]
ORDER]

Action Filed: July 1, 2016
Complaint Removed: August 5, 2016
Trial: None currently Scheduled

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Individually and on Behalf of All Similarly Situated Individuals

NOTICE OF MOTION AND MOTION TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Wednesday, June 26, 2019 at 2:00 p.m., or as soon thereafter as the matter can be heard in Courtroom 2 of the United States District Courthouse located at 450 Golden Gate Avenue, San Francisco, California 94102, before the Honorable William H. Orrick, Plaintiffs Adrian Valente, Mario Pinon and Mynor Cabrera (“Plaintiffs”) will and hereby do move this Court for an Order Granting Preliminary Approval of Partial Class Action Settlement. Plaintiffs’ Motion is based on this Notice and the accompanying Memorandum of Points and Authorities and exhibits thereto; the Declaration of Michael H. Boyamian, and the respective exhibits thereto; the Proposed Order; this Court’s files and records; and any other evidence, briefing, or argument properly before this Court.

Plaintiffs filed this class action lawsuit to address a common occurrence in today’s workplace during a time of high unemployment: the claim by employers that individuals are not employees, but independent contractors. Plaintiffs alleged that they, and the class they seek to represent, are employees of Macy’s West Stores, Inc. (“Macy’s”), and XPO Last Mile, Inc. (“XPO”) (collectively “Defendants”), and the Defendants consistently failed to pay the Plaintiffs and their fellow truck drivers and helpers for all hours worked, and that they were not provided meal and rest periods.

Plaintiffs’ counsel contacted numerous truck drivers and helpers and they verified what Plaintiffs were claiming, namely, that they were not being paid what they were owed, and that they were not being provided with the meal and rest breaks to which they were entitled.

Defendants vehemently deny all allegations and deny that they are liable, in any way, to Plaintiffs or the class that they seek to represent. Defendants assert that Plaintiffs, and the class that they seek to represent, were employed by the

1 businesses that XPO LM contracted with to provide delivery services and that the
2 Plaintiffs, and the class that they seek to represent, were not employed by either of
3 the Defendants.

4 This settlement follows this Court's final approval of a partial settlement the
5 Court previously entered, which encompassed the time period of July 1, 2012 until
6 Defendant Joseph Eletto Transfer, Inc. no longer operated the Macy's warehouse,
7 *i.e.*, December 27, 2014. This partial class action settlement covers the remaining
8 time period from December 28, 2014, up until the Court grants preliminary
9 approval of the proposed class action settlement for which Plaintiffs now seek the
10 Court's approval.

11 Class Counsel reviewed a substantial amount of documents, engaged in
12 protracted discovery efforts, and deposed several key XPO LM and Macy's
13 managerial figures.

14 Plaintiffs, who ask this Court to appoint them as Class Representatives, have
15 negotiated a settlement that, if approved by the Court, will result in the payment of
16 three million five hundred thousand dollars (\$3,500,000.00) to settle the class
17 claims at issue here. Plaintiffs now seek preliminary approval of this class action
18 settlement for the aforementioned remaining class period.

19 Plaintiffs believe the settlement is fair, reasonable, and adequate. They
20 respectfully request that the Court review the Settlement Agreement attached as
21 Exhibit "1" to the Declaration of Michael H. Boyamian ("Boyamian Dec."), and
22 enter an order:

- 23 (1) granting preliminary approval of the proposed Settlement;
24 (2) conditionally certifying the Settlement Class for settlement purposes;
25 (3) approving the form, content and method of distribution of the Notice of
26 Class Action And Class Certification for Settlement Purposes and Verified Claim
27 Forms;
28

(4) appointing Boyamian Law, Inc., Law Offices of Thomas W. Falvey, and JML Law, APLC as Class Counsel;

(5) appointing plaintiffs Adrian Valente, Mario Pinon and Mynor Cabrera as class representatives;

(6) appointing KCC Class Action Services, LLC as Settlement Administrator;

(7) setting a filing deadline for Class Counsel's motion requesting attorneys' fees, costs, enhancement awards to Plaintiffs, which the Plaintiffs respectfully request occur prior to the deadline for Class Members to file objections; and

(8) scheduling a hearing regarding Class Counsel's request for attorney's fees and costs, enhancement awards to Plaintiffs, and final approval of the proposed Settlement.

Dated May 13, 2019

Respectfully Submitted,
BOYAMIAN LAW, INC.
LAW OFFICES OF THOMAS W. FALVEY
JML LAW, APLC

By: /s/ Michael H. Boyamian
Michael H. Boyamian
Attorneys for Plaintiffs and Putative Class

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Adrian Valente, Mario Pinon and Mynor Cabrera (“Plaintiffs”) seek preliminary approval of a settlement on behalf of themselves and the Putative Class comprised of all individuals who performed services as Drivers and/or Helpers delivering Macy’s products and/or furnishings, who did not sign a Delivery Service Agreement with Defendants Macy’s West Stores, Inc., and/or XPO Last Mile, Inc. (“Defendants” or “Macy’s” or “XPO”) (Plaintiffs and Defendants together as the “Parties”), and who were tendered loads at the location identified as the Macy’s Logistic and Operations Distribution Center, 1208 Whipple Road, Union City, California 94587, between December 28, 2014 and the Preliminary Approval Date (“Putative Class” or “Putative Class Members”).

Plaintiffs allege that they and the Putative Class Members were misclassified as independent contractors while performing services for Defendants, and therefore were denied the protections of the California Labor Code. Plaintiffs therefore alleged claims for unpaid wages, minimum wages, overtime pay, interest thereon, wage statement and waiting time penalties, and other legal and equitable relief, as well as reasonable attorneys’ fees and costs.

The main terms of the Settlement are as follows:

a. XPO LM agreed to pay three million five hundred thousand dollars and zero cents (\$3,500,000.00) (“Gross Settlement Amount”) on behalf of Defendants to settle the Action, which shall include the amounts paid to Putative Class Members, court-approved attorneys’ fees and costs, the class representatives as enhancement awards, the LWDA, and court-approved costs of settlement administration.

b. Putative Class Members will receive a portion of the Net Settlement Amount as long as they do not opt out of the Settlement by submitting valid and timely exclusion forms to the Settlement Administrator, as set forth below and as

1 explained in the Notice of Class Action Settlement (“Notice”). Putative Class
 2 Members will also be given the opportunity to submit a Verified Claim Form in
 3 order to specify the number of days they worked for Defendants during the period
 4 covered by this settlement.

5 The Settlement Agreement, including all exhibits, is attached as Exhibit “1”
 6 to the Declaration of Michael H. Boyamian in Support of Plaintiffs’ Motion for
 7 Preliminary Approval of Class Action Settlement (“Boyamian Dec.”), filed
 8 herewith.

9 **II. DEFINITIONS**

10 a. “Action” refers to the state court action filed in the Superior Court of
 11 California, County of Alameda, entitled “RAMON GARCIA, an individual,
 12 VICTOR RAMIREZ, an individual, ADRIAN VALENTE, an individual, MARIO
 13 PINON, an individual, and MYNOR CABRERA, an individual, Individually and
 14 on Behalf of All Similarly Situated Individuals, Plaintiffs, v. MACY'S WEST
 15 STORES, INC., an Ohio corporation, JOSEPH ELETTO TRANSFER, INC., a
 16 New York corporation, XPO LOGISTICS, LLC, an Ohio corporation, and DOES 1
 17 through 25, Inclusive, Defendants, Case Number RG16821800. The Action was
 18 removed to federal court by XPO Last Mile, Inc. on August 5, 2016, Case Number
 19 4:16-cv-04440-YGR. On September 6, 2016, the Action was deemed related to the
 20 *Carter v. XPO Last Mile, Inc.* (Case Number 16-cv-01231-WHO) case and
 21 thereafter was reassigned to the Honorable William H. Orrick.

22 b. “Class Period” shall mean from December 28, 2014 through and up to
 23 the time this Court enters preliminary approval of the Settlement.

24 c. “Class Representative(s)” shall refer to Plaintiffs Adrian Valente,
 25 Mario Pinon, and Mynor Cabrera.

26 d. “Class Representative Enhancement” shall refer to a payment to the
 27 Class Representatives for their services in this Action and as consideration for their
 28 general release of all individual claims against Defendants. This payment is

1 subject to Court approval and shall not exceed \$5,000 for each Class
2 Representative.

3 e. “Court” refers to the United States District Court, Northern District of
4 California, the Honorable William H. Orrick presiding.

5 f. “Defense Counsel” shall refer to Fraser A. McAlpine and Adam L.
6 Lounsbury of Jackson Lewis PC for both XPO Last Mile, Inc. and Macy’s West
7 Stores, Inc., and Michael C. Christman of Macy’s Law Department for Defendant
8 Macy’s West Stores, Inc.

9 g. “Gross Settlement Amount” means the sum of Three Million Five
10 Hundred Thousand dollars and zero cents (\$3,500,000.00) that XPO LM agrees to
11 pay on behalf of Defendants to settle this lawsuit and shall include attorneys' fees
12 and costs (not to exceed 33 1/3% of the Gross Settlement Amount in attorneys' fees
13 and \$50,000 in attorney costs), the amounts distributed to Settlement Class
14 Members from the Net Settlement Amount, payment to the Labor Workforce and
15 Development Agency for Plaintiffs’ Cause of Action for Penalties under the
16 Private Attorneys General Act (hereinafter “PAGA Payment”), the Class
17 Representative Enhancements, and Settlement Administrator Costs. In no event
18 shall Defendants pay or owe more than Three Million Five Hundred Thousand
19 dollars and zero cents (\$3,500,000.00) to fund the Gross Settlement Amount.

20 h. “Net Settlement Amount” shall be the remainder of the Gross
21 Settlement Amount after deductions from the Gross Settlement Amount for
22 attorneys’ fees and costs (not to exceed 33 1/3% of the Gross Settlement Amount
23 in attorneys’ fees and \$50,000 in costs), the Class Representative Enhancements,
24 PAGA Payment, and Settlement Administrator Costs. The Net Settlement Amount
25 shall be established by the Settlement Administrator for the benefit of Settlement
26 Class Members and Settlement Class Members shall be paid from the Net
27 Settlement Amount.

28 i. “Notice” shall mean the Notice of Class Action Settlement,

1 substantially in the form attached as Exhibit “A” to the Settlement Agreement,
2 which is itself attached as Exhibit “1” to the Boyamian Declaration. The
3 Settlement Administrator will mail the Notice to each Putative Class Member
4 explaining the terms of the Settlement. Exhibit “A” is the notice approved by the
5 Parties and subject to Court approval.

6 j. “Plaintiffs’ Counsel” shall collectively refer to Michael H. Boyamian,
7 and Armand R. Kizirian of Boyamian Law, Inc., Thomas W. Falvey of the Law
8 Offices of Thomas W. Falvey, and Joseph M. Lovretovich and Mythily Sivarajah
9 of JML Law, APLC.

10 k. “Preliminary Approval Date” means the date the Order Granting
11 Preliminary Approval of Proposed Class Action Settlement is entered by the Court.

12 l. “Putative Class” or “Putative Class Member” are defined as all
13 individuals who performed services as Drivers and/or Helpers delivering Macy’s
14 products and/or furnishings, who did not sign a Delivery Service Agreement with
15 Defendants Macy’s West Stores, Inc., and/or XPO Last Mile, Inc., and who were
16 tendered loads at the location identified as the Macy’s Logistic and Operations
17 Distribution Center, 1208 Whipple Road, Union City, California 94587, between
18 December 28, 2014 and the Preliminary Approval Date.

19 m. “Settlement” or “Settlement Agreement” shall mean the Joint
20 Stipulation of Class Action Settlement and Release.

21 n. “Settlement Administrator” shall be a third-party claims administrator
22 agreed upon by the Parties to perform the customary duties of a settlement
23 administrator including, but not limited to, the duties enumerated in this Settlement
24 Agreement.

25 o. “Settlement Administrator Costs”, as outlined in the Settlement
26 Agreement marked as Exhibit “1” to the Boyamian Declaration, shall mean the
27 total of all costs actually incurred by the Settlement Administrator in order to make
28

all payments owed to Settlement Class Members and otherwise perform the duties reasonably necessary to administer the Settlement.

p. “Settlement Class Member” shall mean a Putative Class Member who does not timely opt out of the Settlement and shall include the Class Representatives.

III. FACTUAL BACKGROUND AND THE PARTIES’ CONTENTIONS

Defendant Macy’s West Stores, Inc. owns and operates retail department stores in California under the name “Macy’s.” XPO LM is a Georgia corporation doing business in California. It provides logistics services for Macy’s, including arranging for the delivery of certain consumer products and home furnishings that are sent out for delivery to consumers from the Macy’s Logistic and Operations Distribution Center, 1208 Whipple Road, Union City, California 94587.

There are approximately 300 Putative Class Members who currently or formerly delivered those products and furnishings as Drivers of or Helpers on the trucks making deliveries tendered at the Whipple Road location. Declaration of Michael H. Boyamian in Support of Plaintiffs’ Motion for Preliminary Approval of Class Action Settlement (“Boyamian Decl.”), ¶ 16. Plaintiffs claim that those Drivers and Helpers were Defendants’ employees and that they were not properly paid wages under California law. Defendants maintain that those Drivers and Helpers were not their employees; for that reason and others, the Defendants contend that they cannot be liable for the allegedly unpaid wages, penalties, or other damages, that are sought in this action.

IV. PROCEDURAL BACKGROUND

On July 1, 2016, Plaintiffs filed this case in Alameda County Superior Court on behalf of California residents who are or have been utilized as Drivers and Helpers by Defendants during the period commencing July 1, 2012 through the present. Boyamian Decl., ¶ 7.

1 The Complaint states the following causes of action: (1) Unpaid Wages; (2)
2 Failure to Pay Minimum Wage; (3) Failure to Pay Overtime Compensation; (4)
3 Failure to Provide Meal and Rest Periods; (5) Failure to Furnish Accurate Wage
4 and Hour Statements; (6) Waiting Time Penalties; (7) Indemnification; (8)
5 Conversion; and (9) Unfair Competition.

6 On August 5, 2016, Defendant XPO removed this case to the United States
7 District Court for the Northern District of California. On September 6, 2016, the
8 case was deemed related to the *Carter v. XPO Last Mile, Inc.*, case number 3:16-
9 cv-01231-WHO, and reassigned to the Honorable William H. Orrick. On January
10 3, 2017, *Kramer v. XPO Last Mile, Inc.*, case number 3:16-cv-07039-WHO was
11 also deemed to be related to the Carter action and this action, and therefore
12 reassigned to the Honorable William H. Orrick. The parties of these three related
13 actions have since been coordinating with each other, to a limited extent, in
14 moving this litigation forward. The three cases, however, remain distinct and have
15 not been consolidated.

16 Plaintiffs' Counsel has conducted a thorough investigation into the relevant
17 facts and legal claims. Plaintiffs' Counsel closely reviewed the data provided by
18 Defendants, and consulted with an expert, in advance of mediation to determine
19 the amount of damages potentially available to Putative Class Members.
20 Boyamian Decl., ¶¶ 15-21. Class Counsel also contacted and extensively
21 interviewed Putative Class Members.

22 Mediation was conducted with private neutral Michael Dickstein on two
23 occasions: October 25, 2018 in San Francisco, California and November 13, 2018
24 in Toronto, Ontario, Canada. Counsel for the Parties fully briefed their positions to
25 the mediator. After two, full days of extensive arms-length negotiations among the
26 Parties, the Parties were able to reach an agreement in principal. Following the
27 mediation, the parties continued to negotiate extensively and the Parties finalized
28 the terms of the agreement in late March of 2019. Boyamian Decl., ¶ 10.

1 This class action settlement follows an earlier class action settlement in this
 2 case. The prior settlement, which this Court approved, covers the portion of the
 3 class period, from December 28, 2014 to the present. This Settlement
 4 encompasses the second half of the statutory limitations period, when Defendant
 5 Eletto ceased arranging deliveries at the Macy's warehouse and when Defendant
 6 XPO Last Mile, Inc., began arranging deliveries of Macy's products from that
 7 location, *i.e.*, from December 28, 2014, through to the Preliminary Approval Date.
 8 Boyamian Decl., ¶¶ 9-10; Settlement Agreement, ¶ 1(c) and (s).

9 Based on an independent investigation and evaluation, Plaintiffs' Counsel
 10 are of the opinion that the Settlement with Defendants for the consideration and on
 11 the terms set forth in the Settlement Agreement is fair, reasonable, and adequate,
 12 and is in the best interests of the Putative Class Members, in light of all known
 13 facts and circumstances, including the risk of significant delay, the risk that if this
 14 matter is litigated a class may not be certified by the Court or that it may later be
 15 decertified, the risk that Defendants will prevail on their defenses, as well as
 16 potential appellate issues. Boyamian Decl., ¶¶ 11-15.

17 **V. TERMS OF THE SETTLEMENT**

18 The complete Settlement Agreement, along with its exhibits, is attached as
 19 Exhibit "1" to the Declaration of Michael H. Boyamian, filed concurrently
 20 herewith.

21 **VI. LEGAL ARGUMENT**

22 **A. Preliminary Approval of the Settlement is Appropriate.**

23 The dismissal or compromise of a class action requires court approval. Fed.
 24 R. Civ. P. 23(e). Approval involves a two-step process in which the Court first
 25 determines whether a proposed class action settlement warrants preliminary
 26 approval and, if so, directs that notice be sent to proposed class members, reserving
 27 closer scrutiny for the final approval hearing. *See Harris v. Vector Mktg. Corp.*
 28 (ND. Cal. 2011) 2011 U.S. Dist. LEXIS 48878, 23-24. Approval of a class action

1 settlement rests in the discretion of the Court, which should ultimately determine
 2 whether the settlement is fundamentally fair, adequate, and reasonable to the Class.
 3 *See Torrisi v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370, 1375.

4 A court should grant preliminary approval of a settlement if it “appears to be
 5 the product of serious, informed, non-collusive negotiations, has no obvious
 6 deficiencies, does not improperly grant preferential treatment to class
 7 representatives or segments of the class, and falls within the range of possible
 8 approval.” *See In re Tableware Antitrust Litig.* (N.D. Cal. 2007) 484 F.Supp.2d
 9 1078, 1079. A court should also apply its discretion in light of the judicial policy
 10 favoring settlement of complex class action litigation. *See, e.g., Officers for*
 11 *Justice v. CM! Serv. Comtnn of City & Cnty. of San Francisco* (9th Cir. 1982) 688
 12 F.2d 615, 625 (“[I]t must not be overlooked that voluntary conciliation and
 13 settlement are the preferred means of dispute resolution. This is especially true in
 14 complex class action litigation. . .”). As discussed below, application of the
 15 relevant factors to this case supports preliminary approval.

16 1. The Settlement is the Product of Informed, Non-Collusive
 17 Negotiation.

18 Adequate discovery and the use of an experienced mediator support the
 19 conclusion that settlement negotiations were informed and non-collusive. *See*
 20 *Villegas v. J.P. Morgan Chase & Co.*, (N.D. Cal. 2012) 2012 U.S. Dist. LEXIS
 21 166704, *1546. That is what happened here.

22 During the past two years, the parties exchanged significant amounts of class
 23 discovery, and each conducted an extensive investigation of the factual allegations
 24 involved in this case. Numerous depositions were taken, including the depositions
 25 of at least six corporate officers of Defendants that were scattered throughout the
 26 country. Boyamian Decl., ¶¶ 12-14, 25-29, 31.

27 Additionally, in preparation for and during the mediation, the parties
 28 apprised the other of their respective factual contentions, legal theories and

defenses. Consequently, extensive and informed, arms-length negotiations occurred during two, full-day mediation sessions with experienced mediator, Michael Dickstein. Those sessions were held on October 25, 2018, and November 13, 2018. The Parties were able to reach a Settlement that was based upon the mediator's advice and guidance, Class Counsel's experience in the *Fuentes v. Macy's* litigation, and the information and negotiations that informed the earlier *Garcia, et al. v. Macy's* settlement involving Defendant Eletto. Although the Parties agreed upon a settlement figure on November 13, 2018, negotiations regarding the the specific terms of the agreement continued into March of 2019. Boyamian Decl., ¶ 10.

Here, the Settlement Agreement was reached through arm's-length negotiations by experienced counsel familiar with the applicable law, class action litigation, and the facts of this case. The settlement was the product of well-informed, non-collusive negotiations and mediation.

2. The Risks of Further Litigation Support Preliminary Approval.

Plaintiffs allege that Defendants improperly classified the Putative Class Members as independent contractors exempt from minimum wage, overtime, meal and rest period laws, and the wider protections of California Labor Code § 1171. Although Plaintiffs believe they have a strong case, further litigation carries numerous risks and obstacles for Plaintiffs and Putative Class Members, as described below. Boyamian Decl., ¶ 14.

First, Plaintiffs may not be able to certify the Putative Class under Rule 23(b). Plaintiffs largely rely on the Defendants' uniform business practices that treat the Putative Class Members as non-employees or independent contractors to establish both commonality and predominance. Plaintiffs will also argue that other common issues also predominate, such as whether the job expectations and degree of control exercised by Defendants upon the Drivers and Helpers are uniform across the Class.

1 Plaintiffs believe that Drivers and Helpers have strong claims that they were
2 misclassified as independent contractors because they were under the constant
3 supervision and control of Defendants throughout their daily activities, among
4 other things, wearing uniforms, and being told to inform customers that they were
5 making deliveries on behalf of Defendants. Boyamian Decl., ¶ 13. Moreover,
6 Plaintiffs allege that the Putative Class Members were also evaluated and graded
7 for their delivery performance or effectiveness through a variety of metrics
8 implemented by Defendants. Plaintiffs report that those metrics determined
9 whether Drivers and Helpers, were meeting Defendants' expectations or needed to
10 be coached, counseled, or disciplined.

11 Plaintiffs' contend, the California Supreme Court's recent *Dynamex*
12 *Operations West, Inc. v. Superior Court* decision in April 2018 provided further
13 legal support to Plaintiff's misclassification claim. *Dynamex Operations West, Inc.*
14 *v. Superior Court*, 4 Cal. 5th 903 (2018). In *Dynamex*, the Court found that the
15 defendant was unable to meet its burden under the second prong of the 'ABC' test.
16 *Id.* at 965. There, a class of delivery drivers had alleged that they had been
17 misclassified as independent contractors by Dynamex, *i.e.* the hiring entity. *Id.*
18 The Court concluded that Dynamex's entire business was that of a delivery service
19 because, "[a]s a general matter, Dynamex obtains the customers for its deliveries,
20 sets the rate that the customers will be charged, notifies the drivers where to pick
21 up and deliver the packages, tracks the packages, and requires the drivers to utilize
22 its tracking and record-keeping system." *Id.* at 965-966.

23 Plaintiffs contend, these facts are analogous to the services Class Members
24 provided to XPO and Macy's. Defendants maintain that *Dynamex* does not pave
25 the way to class certification in this case, and contend that they will overcome the
26 ABC Test and prove that the Putative Class Members were not employees of either
27 Defendant, if the case is tried.

Even if Plaintiffs can show that Drivers and Helpers were not independent contractors, Defendants can assert numerous defenses regarding liability and damages. For instance, Defendants contend that the businesses with which they contracted to perform delivery services employed Putative Class Members. With regard to Plaintiffs' claims for wage statement and waiting time penalties, both claims are derivative of Plaintiffs' primary wage claims. Thus, Plaintiffs would recover nothing for themselves, or the Class, if the underlying claims are unsuccessful. Boyamian Decl., ¶ 21.

The Defendants' positions in this litigation may result in no recovery for Plaintiffs or the Putative Class Members or protracted appeals and significant risks to meaningful recovery for the Putative Class Members. Consequently, the benefits of the settlement greatly outweigh the risks of continuing to litigate the issues in this case.

3. The Settlement Falls Within the Range of Possible Approval.

In deciding whether the proposed settlement is adequate and falls within the range of possible approval, "courts primarily consider plaintiffs' expected recovery balanced against the value of the settlement offer", while taking into account the risks of continuing litigation. *See In re Tableware Antitrust Litig.* 484 F.Supp.2d at 1080. Courts should recognize that "the agreement reached normally embodies compromise; in exchange for the saving of cost and elimination of risk, the Parties each gave up something they might have won had they proceeded with litigation." *Officers for Justice*, 688 F.2d at 624, (internal quotations and citation omitted). "[I]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair. Rather, the fairness and the adequacy of the settlement should be assessed relative to risks of pursuing the litigation to judgment." *Villegas*, 2012 -U.S. Dist. LEXIS 166704 at 96 (internal quotations and citations omitted).

1 Here, the Settlement is fair, adequate, and well within the range of possible
2 approval. Without conceding that any adverse rulings would be justified, Plaintiffs
3 recognize the risk of such outcomes as described above. If Defendants were able
4 to prove that the Putative Class Members are not employees or properly classified
5 as independent contractors, then the value of the case would be zero. All of
6 Plaintiffs' claims and damages rely upon this threshold issue. Boyamian Decl., ¶¶
7 14, 21.

8 If Plaintiffs are able to demonstrate that Drivers and Helpers are employees,
9 not independent contractors, then the value of Plaintiffs' claims depend principally
10 on the number of hours worked by Putative Class Members, the frequency at
11 which meal and rest breaks were missed, and derivative penalties. Plaintiffs'
12 calculate damages as ranging from \$0, if they cannot prevail on the threshold
13 independent contractor versus employee issue, to approximately \$15,000,000, if
14 Plaintiffs are able to prevail on all claims. Boyamian Decl., ¶¶ 15-19.

15 In order to properly value the claims at issue, however, these figures must be
16 reduced according to the likelihood that Plaintiffs will prevail on their motion for
17 class certification. Moreover, even if class certification is granted, the figures must
18 be further be reduced according to the likelihood that Plaintiffs will ultimately be
19 able to prevail on the merits. As set forth above, for the purposes of settlement
20 only, Plaintiffs acknowledge that this case may face significant hurdles at both the
21 certification and the liability phases of the litigation. Boyamian Decl., ¶ 23.

22 Based on the foregoing, the Settlement will result in a fair and reasonable
23 award to Putative Class Members in light of the litigation risks. The net amount to
24 be paid to the Class under the proposed Settlement (after payment of Class
25 Counsel's attorneys' fees and costs, Settlement Administration Costs, and the
26 Class Representative Enhancements), will be at least \$2,249,000.00. The average
27 Putative Class Member payout under this amount would be approximately
28 \$7,500.00. *Id.* Thus, the Settlement avoids the risks of litigation while ensuring

1 that Settlement Class Members receive substantial consideration for a release of
 2 their claims. The Settlement also affords relief to Settlement Class Members who
 3 likely would not have pursued individual claims. *Id.*

4 Under the circumstances, the amount of the settlement is fair, adequate and
 5 reasonable. *See Scott v. Bimbo Bakeries USA* (ED. Pa. 2014) No. 2:10cv03154
 6 (ECF No. 174) (approving a settlement of wage and hour claims for payments of
 7 \$900 to each current driver and \$450 to each former driver, plus \$12,500
 8 enhancement payments); *Vero v. Aaron Bros.*, (N.D. Cal. 2013) 2013 U.S. Dist.
 9 LEXIS 178511 (granting preliminary approval of settlement of wage and hour
 10 claims where the average recovery would be between approximately \$28 and \$45);
 11 *Bautista v. Harvest Management Sub*, (C.D. Cal. 2013) No. 2:12-cv-10004 (ECF
 12 No. 60) (preliminarily approving a \$2.2 million settlement of wage-and-hour
 13 violation claims of 14,000-member class).

14 The plan of allocation is also fair and reasonable. The Settlement provides
 15 that the settlement fund shall be allocated based on the number of days Putative
 16 Class Members worked during the Class Period, a plan of allocation that is more
 17 precise than a weekly allocation method. *See, e.g., Ching v. Siemens Indus.*, (N.D.
 18 Cal. 2013) 2013 U.S. Dist. LEXIS 169279, at *19 (granting preliminary approval
 19 of settlement and finding that weeks worked was a reasonable basis for allocating
 20 individual payments). Those Settlement Class Members who return verified claim
 21 forms will get paid in an amount of their pro rata share of the settlement fund;
 22 those who do nothing will take equally with all other Settlement Class Members
 23 who do nothing. Either way, the Settlement Class Members will be treated
 24 equitably and given an option as to how their shares will be calculated.

25 4. Plaintiffs' Request for Attorneys' Fees and Costs is Reasonable.

26 The Settlement provides that, prior to the final approval hearing, Class
 27 Counsel may petition the Court for an award of fees in an amount not to exceed
 28 \$1,166,666.67 (33-1/3% of the Settlement Amount) and an award of litigation

1 expenses in an amount not to exceed \$50,000.00. Class Counsel submit that these
2 amounts are fair and reasonable given their investment of time and expense over
3 the nearly three years that they have been litigating this case, their contingent fee
4 risk, and the result that they have achieved for the Putative Class Members. The
5 fees that will be requested are based on the amount that will be paid out to the
6 Class, and are within the range of reasonableness established by Ninth Circuit
7 authority. *See, e.g., Knight v. Red Door Salons, Inc.*, (N.D. Cal. 2009) 2009 U.S.
8 Dist. LEXIS 11149, *17 (observing that class action fee awards average around
9 one-third of the recovery) (citations omitted); *see also Vizcaino v. Microsoft Corp.*,
10 290 F.3d 1043, 1048 (2002) (“exceptional results” in “absence of supporting
11 precedents” is relevant to fee determination).

12 Class Counsel have expended significant time litigating this matter, with a
13 risk of no recovery. With their application for fees and costs, Class Counsel will
14 provide the Court with a detailed breakdown of their hours worked and fees
15 incurred for a lodestar cross-check. Many courts have found that an award of one
16 third of the common fund is warranted under certain circumstances. *See, e.g., In re*
17 *Heritage Bond Litig.*, No. 02-ML-1475-DT(RCX), 2005 WL 1594389, at *8-*17
18 (C.D. Cal. June 10, 2005); *Ogbuehi v. Comcast of California/Colorado/Florida/*
19 *Oregon, Inc.*, No. 2:13-CV-00672-KJM, 2015 WL 3622999, at *11-*12 (E.D. Cal.
20 June 9, 2015); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 492 (E.D.
21 Cal. 2010); *In re Med. X-Ray Film Antitrust Litig.*, No. CV-93-5904, 1998 WL
22 661515, at *6 (E.D.N.Y. Aug. 7, 1998). Class Counsel should be given the
23 opportunity to make such a showing to this Court through their application for fees
24 and costs.

25 Class Counsel shall file their application for fees and costs well in advance
26 of the final approval hearing date, so that Putative Class Members can be fully
27 informed of the fee request and have ample time to consider the request prior to the
28 deadline for objecting and opting out. *See In re Mercury Interactive Securities*

1 *Litigation* (9th Cir. 2010) 618 F.3d 988, 994. The fee motion will be heard at the
2 same time as the final approval motion.

3 5. Plaintiffs' Proposed Enhancement Awards Are Reasonable.

4 Service or incentive awards are typical in class action cases. *Rodriguez v.*
5 *W. Publ'g Corp.* (9th Cir. 2009) 563 F.3d 948, 958. In evaluating incentive
6 awards, courts may consider "1) the risk to the class representative in commencing
7 suit, both financial and otherwise; 2) the notoriety and personal difficulties
8 encountered by the class representative; 3) the amount of time and effort spent by
9 the class representative; 4) the duration of the litigation and; 5) the personal benefit
10 (or lack thereof) enjoyed by the class representative as a result of the litigation."
11 *Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F.Supp. 294, 299.
12 Here, Class Counsel believe that the Class Representative Enhancement award up
13 to the total amount requested of \$5,000.00 each is consistent with a fair, just and
14 adequate settlement.¹

15 Plaintiffs initiated this case and sought counsel to represent the proposed
16 Class. Plaintiffs met with Class Counsel and provided documentary evidence
17 relevant to the claims in the case. Boyamian Decl., ¶ 25. Each Class
18 Representative also participated in a full day of their own deposition in which they
19 were heavily questioned about the facts and circumstances surrounding their work
20 with Defendants. Plaintiffs also risked their own professional reputation by suing
21 their, alleged, former and current employer. Any potential future employer who
22 searches the internet or runs a background check on Plaintiffs will discover this
23 fact. In a competitive job market, this factor may weigh heavily against them.

24
25
26 ¹ Plaintiffs Ramon Garcia and Victor Ramirez are not designated as Class
27 Representatives for purposes of this lawsuit and settlement against XPO and
28 Macy's. Mr. Garcia did not perform delivery services during the Class Period
when XPO operated the Macy's warehouse. Similarly, during the Class Period,
Mr. Ramirez was a contractor carrier and therefore did not attend his scheduled
deposition.

1 Therefore, Plaintiffs have also undertaken risks with respect to their future
2 employment prospects. *Id.*

3 Plaintiffs will provide a supporting declaration at final approval describing
4 their efforts in this case, the amount of time spent serving the class, and the risks
5 they incurred.

6 6. The Settlement Administrator Costs are Reasonable.

7 Plaintiffs propose appointing KCC Class Action Services, LLC (“KCC”) as
8 the Settlement Administrator in this case. Class Counsel has elected to use KCC
9 given their involvement in the earlier *Garcia I* settlement, and because it offered a
10 competitive bid, and because of Class Counsel’s positive prior experiences with it.
11 Boyamian Decl., ¶ 26. Class Counsel also believes KCC has an significant
12 advantage given its familiarity with the issues surrounding class participation and
13 receiving contact in the past from participating Class Members in the *Garcia I*
14 settlement. KCC’s estimate is attached. Boyamian Decl., Exhibit “2”.

15 The Settlement Administration Costs will be paid from the Gross Settlement
16 Amount. The estimate from KCC provides that the settlement administration costs
17 will equal approximately \$16,500.00, in line with the Settlement Agreement. KCC
18 will file a declaration with the Court explaining the basis for the costs above
19 \$15,000.00. Settlement Agreement ¶ 13. The final settlement costs and supporting
20 documentation will be submitted to the Court prior to the final approval hearing.
21 The Settlement Administration Costs here are reasonable as compared to the value
22 of the settlement and the work that needs to be performed to administer the
23 Settlement properly.

24 **B. The Class Should be Provisionally Certified.**

25 Plaintiffs requests that the Court provisionally certify the Rule 23(b)(3) class
26 for settlement purposes. The purpose of provisional class certification is to
27 facilitate distribution to proposed class members a notice informing them of the
28 terms of the proposed settlement, and the date and time of the final approval

1 hearing. *See* Manual for Complex Litigation, Fourth §§ 21.632-33. For purposes
 2 of effectuating this Settlement only, Defendants Macy's and XPO LM do not
 3 oppose Plaintiffs' request to provisionally certify the Putative Class. Settlement
 4 Agreement, ¶ 33(e).

5 1. Standards Governing Approval of Settlement Classes.

6 When considering a motion for preliminary approval of a settlement, the
 7 Court must make a threshold determination as to whether the proposed settlement
 8 class meets Rule 23 requirements. *See Hanlon v. Chrysler Corp.* (9th Cir. 1998)
 9 150 F.3d 1011, 1019-20. Specifically, under Rule 23(a), the Court must determine
 10 whether (1) the proposed class is so numerous that joinder would be impracticable;
 11 (2) there are questions of law or fact common to the class; (3) the named plaintiffs'
 12 claims are typical of the claims of the proposed class; and (4) plaintiffs and their
 13 counsel will adequately and fairly represent the interests of the class. *Id.* at 1019.

14 Additionally, the action must be maintainable under Fed. R. Civ. P. 23(b)
 15 (1), (2), or (3). *Id.* at 1022. Based on these standards, as further discussed below,
 16 the Court should certify the proposed Settlement Class for settlement purposes.

17 2. The Class Satisfies the Requirements of Rule 23(a).

18 The proposed Class satisfies all requirements of Rule 23(a). First, it is
 19 sufficiently numerous to satisfy Rule 23(a)(1). "While there is no set number of
 20 members required, courts have generally found classes numbering in the hundreds
 21 to be sufficient to satisfy the numerosity requirement." *Campbell v. Pricewater-*
 22 *houseCoopers* (E.D.Cal. 2008) 253 F.R.D. 586, 594. In this case, the proposed
 23 class consists of approximately 300 Putative Class Members who worked for
 24 Defendants during the Class Period. Boyamian Decl., ¶¶ 16, 17. This will easily
 25 satisfy the numerosity requirement.

26 Second, Rule 23(a)(2) is satisfied because there are questions of law and fact
 27 common to the proposed Class. *See Mazza v. Am. Honda Motor Co., Inc.* (9th Cir.
 28 2012) 666 F.3d 581, 589 ("Commonality only requires a single significant question

1 of law or fact.”). The showing required to satisfy commonality is minimal.
2 *Hanlon*, 150 F. 3d at 1020. The presence of a single common question that will
3 “drive the resolution of the litigation” is sufficient *Campbell v.*
4 *PricewaterhouseCoopers, LLP* (E.D.Cal. 2012) 287 F.R.D. 615, 620. Here,
5 common factual and legal issues include whether Putative Class Members are
6 employees that were improperly classified independent contractors. That issue,
7 alone, satisfies the commonality requirement of Rule 23(a)(2). Boyamian Decl., ¶¶
8 11-13.

9 Third, the typicality requirement of Rule 23(a)(3) is satisfied because the
10 Plaintiffs claims are typical of the claims held by the Putative Class. Typicality is
11 established if representative claims are “reasonably co-extensive with those of
12 absent class members; they need not be substantially identical.” *Hanlon*, 150 F.3d
13 at 1020. Plaintiffs’ claims arise out of the same factual and legal circumstances as
14 the claims of Putative Class Members. Plaintiffs contend that, like all Putative
15 Class Members, they were unlawfully classified as independent contractors,
16 regularly worked unpaid overtime hours, were deprived meal and rest period
17 breaks and premiums, were not given accurate wage statements, and are ‘aggrieved
18 employees’ under PAGA. Because Defendants’ business practices, about which
19 the Plaintiffs complain, were uniform and impacted all Putative Class Members,
20 Plaintiffs’ claims against Defendants are typical of those of the Class. Boyamian
21 Decl., ¶ 13.

22 Fourth, Plaintiffs’ Counsel satisfy the adequacy requirement of Rule
23 23(a)(4), as well as the requirements of Rule 23(g). Rule 23(a)(4) requires that the
24 Parties fairly and adequately protect the interests of the class. The adequacy
25 requirement is met where the named plaintiffs and their counsel do not have
26 conflicts of interest with other putative class members, and the named plaintiffs
27 and their counsel will vigorously prosecute the interests of the class. *Hanlon*, 150
28 F.3d at 1020. Here, Plaintiffs and their experienced class counsel will more than

adequately represent the Putative Class. There are no conflicts and Class Representatives have claims that are in line with those of the Class. Plaintiffs have diligently participated in the litigation by communicating regularly with counsel and providing documents and information about the Class claims. Boyamian Decl., ¶ 25.

Rule 23(g)(1) requires courts, when appointing class counsel, to consider: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions, other complex litigation and the type of claims asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources that counsel will commit to its representation. Here, Class Counsel have investigated and prosecuted the claims; have extensive experience in class action litigation, including wage-and-hour claims, and have been appointed Class Counsel in numerous other cases; and have demonstrated that they have the ability and resources to vigorously pursue the claims. Boyamian Decl., ¶¶ 2-6. For these reasons, Plaintiffs' Counsel and Plaintiffs meet the adequacy requirement of Rule 23(a)(4). Plaintiffs' Counsel should be appointed as Class Counsel pursuant to Rule 23(g).

3. The Class Meets the Requirements of Rule 23(b)(3).

The Putative Class meets the requirements of Rule 23(b)(3) because common questions "predominate over any questions affecting only individual members," and class resolution is "superior to other available methods for the fair and efficient adjudication of the controversy."

First, the Putative Class satisfies the predominance requirement, which examines whether the proposed classes are "sufficiently cohesive to warrant adjudication by representation." *Hanlon*, 150 F.3d at 1022. "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Id.*

Here, common issues predominate because Plaintiffs’ claims turn on a common liability issue suited to class-wide adjudication: whether or not the Putative Class Members are employees or properly classified as independent contractors under California law, based on the job duties and expectations applicable to all Drivers and Helpers. Whether or not Drivers and Helpers are considered independent contractors under California law is an inherently common question that predominates over any individualized issues. Liability for Plaintiffs’ state law claims stem from this threshold question and thus depend upon common proof. Boyamian Decl., ¶ 14.

Second, Rule 23(b)(3) is satisfied because resolution of the issues in this case on a class-wide basis is “superior to other available methods for the fair and efficient adjudication of the controversy.” *See Hanlon*, 150 F.3d at 1023. The alternative to a single class action—numerous individual actions—would be inefficient and unfair. *See, e.g., Custom LED, LLC v. eBay, Inc.*, (N.D. Cal. 2013) 2013 U.S. Dist. LEX1S 122022 (superiority established because a “class action would achieve the resolution of the putative class members’ claims at a lower cost and would reduce the likelihood of inconsistent determinations”). Class actions are generally found to be superior where individual claims are relatively small, there is a large volume of individual claims, individuals lack a compelling interest in controlling their own litigation, and there would be a strain on judicial resources if individual claims were filed. *See Wang v. Chinese Daily News, Inc.* (C.D. Cal. 2005) 231 F.R.D. 602, 614.

4. Summary of the Terms of the Proposed Settlement Agreement and Release of Claims.

The complete details of the Settlement are contained in the Joint Stipulation of Class Action Settlement and Release, signed by the Parties (Exhibit “1” to the Boyamian Declaration). A summary of the settlement’s primary terms follows:

(i) Class Definition

1 The Class is comprised of all individuals who performed services as Drivers
 2 and/or Helpers delivering Macy's products and/or furnishings, who did not sign a
 3 Delivery Service Agreement with Defendants, and who were tendered loads at the
 4 location identified as the Macy's Logistic and Operations Distribution Center,
 5 1208 Whipple Road, Union City, California 94587, between December 28, 2014,
 6 and the Preliminary Approval Date.

7 (ii) Settlement Amount

8 The Settlement Agreement provides that Defendant XPO will pay three
 9 million five hundred thousand dollars (\$3,500,000.00) to fund a common
 10 settlement fund. Settlement Agreement ¶ 1(m). In exchange, Defendants XPO
 11 LM will receive a complete release as to the claims that were or could have been
 12 asserted in this suit. Defendant Macy's will receive a complete release as to the
 13 claims that were or could have been asserted in this suit, limited only to the time
 14 period beginning December 28, 2014 through the Preliminary Approval Date (the
 15 statutory period prior to this was covered in the first settlement with defendant
 16 Eletto). The gross settlement amount of \$3,500,000.00 includes the amount to be
 17 distributed to the Putative Class members, attorneys' fees and costs, the Class
 18 Representative Enhancements, PAGA Payment, and settlement administration
 19 costs.

20 (iii) Allocation of Payments and Distribution to
 21 Class Members

22 This is not a mandatory claims-made settlement. Putative Class Members
 23 will receive a portion of the Net Settlement Amount as long as they do not opt out
 24 of the Settlement by submitting valid and timely exclusion forms to the Settlement
 25 Administrator, as set forth below and as explained in the Notice. However, all
 26 Putative Class Members will be given the opportunity to submit a Verified Claim
 27 Form to specify the number of days they believed they worked within the Class
 28

1 Period, subject to a reasonable adjustment after consultation with the Settlement
2 Administrator and the Parties. Settlement Agreement, ¶ 10(b)(ii), (c)(ii).

3 Payments to Putative Class Members from the Net Settlement Amount shall
4 be allocated 85% as penalties and interest with the corresponding issuance of a
5 Forms 1099-MISC, and 15% will be allocated as wages to be reported on an IRS
6 Form W-2. The Settlement Administrator will calculate the individual settlement
7 awards to eligible Putative Class Members, and withhold federal, state and local
8 tax from the portion allocated as wages.

9 The Net Settlement Amount will be divided between the Putative Class
10 Member Drivers and Helpers with 60% of the amount earmarked for distribution to
11 Putative Class Member Drivers, and 40% earmarked for distribution to Putative
12 Class Member Helpers. This division of the Net Settlement Amount was
13 developed because Drivers earned a higher daily fixed rate than Helpers earned.
14 Settlement Agreement, ¶ 10(b), (c).

15 In order to calculate each Putative Class Member's share of the settlement,
16 the Settlement Administrator will use the following formulas:

17 The proportionate share of the Driver Net Settlement Amount for each
18 Settlement Class Member Driver who returns a Verified Claim Form shall be that
19 Settlement Class Member Driver's numerator divided by the denominator. The
20 numerator for each Settlement Class Member Driver who returns a Verified Claim
21 Form shall be the total number of days reported by that Settlement Class Member
22 Driver, subject to a possible reasonable adjustment necessarily made after
23 consultation among the Settlement Administrator and counsel for the Parties. The
24 denominator for each Settlement Class Member Driver who returns a Verified
25 Claim Form shall be the total number of days worked by all Settlement Class
26 Member Drivers, which has been calculated by an intensive review of the
27 Defendants' records. The Settlement Administrator will multiply the Driver Net
28 Settlement Amount by the proportionate share of each Settlement Class Member

1 Driver who returns a Verified Claim Form to determine that Settlement Class
2 Member Helper's settlement share.

3 The Settlement Class Member Drivers that do not submit a Verified Claim
4 Form reporting the number of days they worked will share equally in the Driver
5 Net Settlement Amount that has not been claimed by those Settlement Class
6 Member Drivers who submit verified claim forms. Settlement Agreement, ¶ 10(b).

7 The proportionate share of the Helper Net Settlement Amount for each
8 Settlement Class Member Helper who returns a Verified Claim Form shall be that
9 Settlement Class Member Helper's numerator divided by the denominator. The
10 numerator for each Settlement Class Member Helper who returns a Verified Claim
11 Form shall be the total number of days reported by that Settlement Class Member
12 Helper, subject to a possible reasonable adjustment necessarily made after
13 consultation among the Settlement Administrator and counsel for Defendants and
14 Plaintiffs. The denominator for each Settlement Class Member Helper who returns
15 a Verified Claim Form shall be the total number of days worked by all Settlement
16 Class Member Drivers. The Settlement Administrator will multiply the Helper Net
17 Settlement Amount by the proportionate share of each Settlement Class Member
18 Helper who returns a Verified Claim Form to determine that Settlement Class
19 Member Helper's settlement share.

20 The Settlement Class Member Helpers who do not submit a Verified Claim
21 Form reporting the days that they worked will share equally in Helper Net
22 Settlement Amount that has not been claimed by those Settlement Class Member
23 Helpers who submit verified claim forms. Settlement Agreement, ¶ 10(c).

24 Checks issued to Settlement Class Members pursuant to this Settlement shall
25 remain negotiable for a period of one-hundred and eighty (180) days from the date
26 of mailing. Settlement Class Members who fail to negotiate (*i.e.*, cash or deposit)
27 their check(s) within the 180 day window shall remain subject to the terms of this
28 Settlement. After the expiration of the 180 days, the sum of any un-cashed/un-

1 deposited checks shall be distributed to the Legal Aid Society – Employment Law
2 Center. Settlement Agreement, ¶ 10(d).

3 All compensation disputes will be resolved and decided by the Settlement
4 Administrator after conferring with counsel for the Parties. The Settlement
5 Administrator’s decision on all disputes will be final and non-appealable.
6 Settlement Agreement, ¶ 10(e). Under no circumstance will the Gross Settlement
7 Amount or any portion thereof revert back to Defendants. Settlement Agreement,
8 ¶¶ 10(d), 11(d).

9 (iv) Attorneys’ Fees, Costs, and Enhancement Fees

10 Class Counsel may apply for, and Defendants will not oppose, an award of
11 attorneys’ fees in an amount up to one-third (33-1/3%) of the Gross Settlement
12 Amount (one million one hundred sixty-six thousand six hundred and sixty-six
13 dollars and sixty-seven cents (or \$1,166,666.67), and costs of up to \$50,000.00, all
14 of which shall be paid exclusively from the Gross Settlement Amount. In the event
15 that Class Counsel are not awarded their requested fees and costs, in whole or in
16 part, no non-awarded fees or costs shall revert to Defendants, instead will revert to
17 the Net Settlement Amount. Settlement Agreement, ¶ 10(e).

18 The Class Representative Enhancement is in addition to the Plaintiffs’
19 individual settlement award. In exchange for the Class Representative
20 Enhancement (up to but not to exceed \$5,000.00 each), the Class Representatives
21 must execute a general release in favor of Defendants. Defendants will not oppose
22 each Plaintiffs’ enhancement petition so long as it does not exceed \$5,000.00. In
23 the event that the Class Representatives are not awarded the requested \$5,000.00,
24 in whole or in part, no part of the requested award shall revert to Defendants, but
25 instead shall revert to the Net Settlement Amount. Settlement Agreement, ¶ 10(e).

26 (v) Costs of Settlement Administration

27 The Settlement Administrator shall be entitled to payment, from the Gross
28 Settlement Amount, for the reasonable costs of administering this settlement. In

the event that the Settlement Administrator's reasonable costs of administering this settlement exceed \$20,000.00, the Settlement Administrator shall file a declaration with the Court explaining the basis for the costs above \$20,000.00 and seeking approval for payment of the additional reasonable costs out of the amount remaining from the Net Settlement Amount. The Settlement Administrator shall not be paid for costs above \$15,000.00 absent Court approval. Settlement Agreement, ¶ 13.

(vi) Administration of Notice and Opt-Out Process

This Settlement is not a claims-made settlement. Putative Class Members do not need to submit claims in order to participate in the Settlement, however, Putative Class Members are encouraged to submit a Verified Claim Form in order to receive a more accurate distribution. The Notice and Verified Claim Form, attached to the Settlement Agreement as Exhibit "A" and Exhibit "A-1", shall be sent by the Settlement Administrator to the Putative Class Members, by first class mail. The Notice shall notify each Putative Class Member of the pendency of this suit, the nature of the claims, and the fact of partial settlement. In addition, the Notice will notify Putative Class Member that they may submit a Verified Claim Form, attesting to the number of days that they delivered Macy's products that were tendered to them at the Whipple Road location, at any time from December 28, 2014, through the Preliminary Approval Date. Settlement Agreement, ¶ 31.

Within fourteen (14) calendar days of the Preliminary Approval Date, Defendant XPO will provide the Settlement Class's identifying information to the Settlement Administrator. In the event there is missing contact information, the Parties will make their best efforts to obtain and provide the approximate, last-known data/information. Within twenty-one (21) calendar days of the Preliminary Approval Date, the Settlement Administrator will mail the Notice and Verified Claim Form to the Settlement Class. Settlement Agreement, ¶ 14.

Putative Class Members will have forty-five (45) days in which to postmark objections, disputes, and/or requests for exclusion. The Settlement Administrator will skip-trace returned mail and re-mail within five days. Under no circumstances will this extend the period for post-marking objections, disputes, and/or requests for exclusion claims by more than an additional fifteen (15) days. Settlement Agreement, ¶ 16. If an envelope so mailed has not been returned within thirty (30) days of the mailing, it will be presumed that the Putative Class Member received the Notice. Settlement Agreement, ¶ 17.

(vii) Disputes, Requests for Exclusion and Objections

The Notice shall provide forty-five (45) days from the mailing date of the Notice for each Putative Class Member to (1) submit a Verified Claim Form; (2) opt out of the Settlement; or (3) object to the settlement. Settlement Agreement, ¶ 21.

As Putative Class Members will not be allocated an initial number of days worked, but will instead be given an opportunity to submit a Verified Claim Form, disputes can only arise if the Settlement Administrator and the Parties make a reasonable adjustment to the figure claimed on a Verified Claim Form. In such a circumstance, the Settlement Administrator will have the authority to resolve a dispute stemming from a reasonable adjustment made on the Putative Class Member's Verified Claim Form. Settlement Agreement, ¶ 15.

Unless otherwise agreed to in writing by counsel for Plaintiffs and Defendants, no opt out request will be accepted if postmarked to the Settlement Administrator more than forty-five (45) calendar days after the date the Notice was mailed to the Putative Class Member. All original opt out requests shall be sent directly to the Settlement Administrator at the address indicated on the Notice and the Settlement Administrator will forward such opt out requests to Class Counsel and Defense Counsel. The Settlement Administrator will certify jointly to Class Counsel and Defense Counsel the number of all Putative Class Members who have

1 submitted opt out requests, objections and/or disputes. During the forty-five (45)
2 day period after the date the Notice is mailed to Putative Class Members, the
3 Settlement Administrator will provide this information beginning on the 15th day
4 after the Notice is mailed, and will update this information every following seven
5 (7) days. Settlement Agreement, ¶ 22.

6 No later than twenty-one (21) calendar days prior to the Final Approval
7 Hearing, the Settlement Administrator will submit a list to Class Counsel and
8 Defense Counsel of all timely, valid opt out requests, disputes and all objections
9 received from Putative Class Members. Settlement Agreement, ¶ 23. Defendants
10 have the option of withdrawing from the settlement if seven percent (7 %) or more
11 of the Putative Class Members opt out of the Settlement. Settlement Agreement, ¶
12 24.

13 Any Putative Class Member wishing to object to the Court's approval of this
14 Settlement shall file any such written objections and/or memorandums of points
15 and authorities in support thereof with the Court and shall serve Class Counsel and
16 Defense Counsel no later than forty-five (45) days from the mailing of the Notice.
17 Settlement Agreement, ¶ 25.

18 A Putative Class Member who has submitted an opt-out request may not
19 submit any objections to the Settlement. Any Putative Class Member who fails to
20 file a timely written objection shall be foreclosed from objecting to this Settlement.
21 Settlement Agreement, ¶ 25. Class Counsel and Defense Counsel shall file any
22 response to any objections filed by objecting Putative Class Members at least
23 seven (7) calendar days before the Final Approval Hearing. Settlement
24 Agreement, ¶ 26.

25 (vii) Release of Claims

26 Upon the Final Approval Date, Putative Class Members who do not timely
27 opt out shall fully release and discharge the Releasees from all claims, whether
28 known or unknown, that were alleged or asserted, or that could have been alleged

or asserted based upon the factual allegations set forth in the operative complaint, in the Action, or in which any way arose out of or relate to the services they performed for Defendants Macy's or XPO LM at the Macy's Logistics and Operations distribution center, located at 1208 Whipple Road, Union City, California 94587 from December 28, 2014 to the Preliminary Approval Date. Settlement Agreement, ¶ 31. Finally, Plaintiffs have agreed to execute a general release of all claims against Defendants, both known and unknown. This is further reason to grant the service payments sought. Settlement Agreement, ¶¶ 32-33; Boyamian Decl. ¶ 26.

VII. CONCLUSION

For all of the reasons set forth above, Plaintiffs' respectfully request that this Court certify the proposed class for settlement, and to grant preliminary approval of the class action settlement.

Dated May 13, 2019

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